IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3942 OF 2007
WITH
CHAMBER SUMMONS NO.376 OF 2007
WITH
CHAMBER SUMMONS NO.450 OF 2006
IN
SUIT NO.376 OF 1979

Atmaram Narayan Sukthankar & Ors. ..Plaintiffs.

V/s.

Phillips L. Kallath & Ors. ..Defendants.

Mr.Naushad Engineer a/w. Mr.Yadkikar i/b. Desai & Diwanji for Plaintiffs.

Mr.D.V.D'Lima for Defendant Nos. 4,5,11,12,14,16, 18, 19.

CORAM: A.M.KHANWILKAR,J

DATE : OCTOBER 24, 2007.

P.C. :

1. This order will dispose of all the three proceeding together.

2. Briefly stated, the present suit was filed by three Plaintiffs in the capacity of trustees of family trust known as Dr.N.A.Sukhtankar property Trust. During the pendency of the suit, the Plaintiff No.2 died on 30th June, 1997 and Plaintiff No.3 died on 18th December, 1998. The Applicant No.1 came to be appointed as trustee of the said Trust on

15th January, 1999 in place of Plaintiff No.2 and Applicant No.2 in place of Plaintiff No.3 on 15th March, 2002. After the Applicants were appointed as trustees, application was moved by the Applicant No.1 being Chamber Summons No.450 of 2006 in the pending suit for amendment of plaint, so as to bring the new trustees on record alongwith the earlier trustee. The said Chamber Summons came to be dismissed on 9th January, 2007 on account of failure to serve the Defendant No.1. The Plaintiff No.1 was advised to take out fresh Chamber Summons being Chamber Summons No.376 of 2007 seeking similar relief claimed in the former Chamber summons No.450/2006. The Plaintiff No.1/applicant attempted to serve the said Chamber Summons on the Defendants but in vain. Eventually, the Plaintiff No.1/applicant was permitted to serve the Defendants by substituted service, which procedure has been complied with. When the Chamber Summons No.376 of 2007 came up for hearing on 27th September, 2007, Counsel for the Defendant Nos.4,5,11,12,14,16,17,19 raised preliminary objection about maintainability of the Chamber Summons No.376 of 2007. For the nature of objection raised, the Plaintiff No.1/applicant was given opportunity to take out appropriate application, so as to restore Chamber Summons No.450 of 2006.

Accordingly, the Plaintiff No.1 has filed Notice of Motion No.3942 of 2007. The above numbered Defendants have opposed grant of any relief to the Plaintiff No.1/Applicant as prayed for in either of these proceedings.

3. In the first place, I shall proceed to consider the request made in Notice of Motion No.3942 of 2007, which if granted, the former Chamber Summons No.450 of 2006 will be restored to the file to its original number, to be proceeded in accordance with the law. In that case the Plaintiff No.1/applicant will not be required to pursue the Chamber Summons No.376 of 2007. Although the Notice of Motion No.3942 of 2007 is opposed on behalf of the above numbered Defendants, having regard to the assertions made in the affidavit in support of the said Motion, I am of the view that the Plaintiff No.1/Applicant has made out sufficient cause for showing indulgence. Such indulgence will have to be shown in the interest of justice. Accordingly, Notice of Motion No.3942 of 2007 is made absolute in terms of prayer clause (a) and (c).

4. In view of the above order, the Plaintiff No.1/Applicant does not wish to pursue Chamber

Summons No.376 of 2007. The same is disposed of as not pressed.

5. That takes me to the Chamber Summons No.450 of 2006. The principal objection on behalf of the above numbered Defendants to grant of any relief in this Chamber Summons is that the Trust is not a registered trust. Besides, the appointment of two persons, who are sought to be impleaded as Plaintiffs is not by way of registered deed. Moreover, there is gross delay in taking out the application. In fact, it is a case of abatement of the Suit.

6 Taking the last argument first, as the main Suit has been instituted by the Plaintiffs in the capacity of trustees and one of the trustee is still surviving and continues to be Plaintiff No.1, it is not possible to accept the argument that the suit has abated. The cause of action in the suit continues to vest in the Plaintiff No.1.

7. In so far as the issue raised on behalf of the Defendants that there is no registered trust deed, I find substance in the argument of the Applicant that there is no need of registered deed for appointment of new trustees to replace outgoing

trustees, who in this case have died during the pendency of the present proceedings. That course can be adopted as per section 17 of the Indian Trust Act, 1882.

8. In so far as grievance of the Defendants that the Application taken out by the Plaintiffs suffers from gross delay. Even that argument does not commend to me. I am inclined to accept the argument of the Plaintiffs/applicants that the replacement of new trustees has been done on 15th January, 1999 and 15th March, 2002 respectively. I find substance in the argument canvassed on behalf of the applicant that in the present case, provision of article 120 of the Limitation Act will have no application, for it is not a case of bringing legal heirs and representatives on record but to bring on record new trustees appointed by the trust. The fact remains that no prejudice will be caused to the Defendants, if this application was to be granted. This is so because, I have already opined that the suit does not abate and the Plaintiff No.1 would be entitled to espouse the cause on behalf of the trust as he would continue to represent the estate of the trust. Accordingly, the Chamber Summons No.450 of 2006 is made absolute in terms of prayer clause (c) and (d).

Amendment to be carried out within two weeks from today.

(A.M.KHANWILKAR,J)